

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1178

GULF STATES UTILITIES CO., PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**MEMORANDUM FOR THE FEDERAL POWER
COMMISSION IN OPPOSITION**

1. Petitioner seeks review of the court of appeals' decision (Pet. App. 1a-29a) remanding to the Federal Power Commission for further proceedings this case in which the Commission, pursuant to Section 204 of the Federal Power Act, 16 U.S.C. 824c, had authorized petitioner to issue \$30 million of first mortgage bonds. The proceeds from the sale of the bonds were to be used to replace outstanding short-term notes.

Subsequent to the filing of petitioner's application for authorization to sell the bonds with the Commis-

sion, the Cities of Lafayette and Plaquemine, Louisiana, filed a protest and petition to intervene alleging that petitioner had engaged in certain anticompetitive practices in violation of the antitrust laws; the cities requested the Commission to withhold authorization of the issuance of the securities and to hold a hearing on the allegations (Pet. App. 34a). The Commission granted the petition to intervene, but denied the requested hearing on the ground that the alleged violations "are irrelevant to a requested authorization of securities" (Pet. App. 34a-36a). The Commission further stated that there was no relief it could order in the context of the proceeding that "would have any effect on the interest of the [cities], or solve any of the problems outlined by them" (Pet. App. 35a).

On petitions for review, the court held that the Commission must consider antitrust allegations when authorizing the issuance of securities under Section 204. The court rejected the Commission's prior determination in *Pacific Power & Light Co.*, 27 FPC 623, that its authority under Section 204 was limited to safeguarding the public against unsound financial practices, noting that the *Pacific Power & Light* ruling pre-dated this Court's decision in *Denver & Rio Grande Western R. Co. v. United States*, 387 U.S. 485. The court found the latter case controlling (Pet. App. 16a-18a) in light of the Commission's regulatory responsibilities under Section 202 (interconnection and coordination of facilities), 203 (mergers), and 206 (rates and charges) of the Act, 16 U.S.C. 824a, 824b and 824e (Pet. App. 18a-20a).

In remanding the case, the court of appeals noted that the Commission need not hold a hearing on the cities' allegations if it concluded that the allegations did not raise substantial anticompetitive issues or were not reasonably related to the issuance of the securities, as long as the record reflected the Commission's basis for so concluding (Pet. App. 22a). The court also recognized that questions relating to the issuance of securities to provide funds for a utility's construction program "must be decided in a time frame much more limited than often contemplated for antitrust litigation" (Pet. App. 22a-23a). Accordingly, the court suggested several options available to the Commission where antitrust allegations are made in Section 204 proceedings (Pet. App. 23a).¹

¹ In another case consolidated with this one, the court of appeals affirmed two orders of the Securities and Exchange Commission authorizing under Section 7 of the Public Utility Holding Company Act, 15 U.S.C. 79g, the issuance of certain securities by the Louisiana Power & Light Company, notwithstanding the Commission's failure to consider the cities' allegations that the company had engaged in certain anticompetitive practices (Pet. App. 24a-29a). In their memorandum in opposition to the petition in this case, the cities contend that there is no basis for distinguishing between the Securities and Exchange Commission's responsibilities under Section 7 of the Holding Company Act and the Federal Power Commission's responsibilities under Section 204 of the Federal Power Act and state that they "reserve the right" to attack the affirmance of the orders of the Securities and Exchange Commission if certiorari is granted (Mem. in Opp., p. 3). But, since the cities did not petition from that aspect of the court of appeals' decision and since their time to petition had expired prior to the filing of their memorandum in opposition, the propriety of the Securities and Exchange Commission orders is not in issue before this Court.

2. The Commission agrees with petitioner that the court of appeals erred in requiring the Commission to consider allegations of anticompetitive conduct in the context of a proceeding under Section 204, as distinguished from proceedings under other provisions of the Federal Power Act. In the Commission's view, the court of appeals failed to give proper weight to the Commission's own interpretation of Section 204 in *Pacific Power & Light* (see *Udall v. Tallman*, 380 U.S. 1) and misapplied this Court's decision in *Denver & Rio Grande*.² In view of the options left open to the Commission by the court below, however, the Commission does not now believe that the decision will seriously inhibit it in performing its statutory responsibilities to protect the consumer interest in an adequate and reliable, low cost supply of electric energy. The Commission is free under the decision to apply such remedies, if any, as may be appropriate under the Federal Power Act in the light of any anti-competitive practices it might find.

² As a result of the decision below, at least two, and possibly three, federal agencies will be considering the cities' allegations of anti-competitive practices. In addition to the Federal Power Commission's proceeding, the Department of Justice has issued Civil Investigative Demands to determine whether there is any basis for filing an antitrust complaint in a district court. Sec. 15 U.S.C. 1312. Moreover, the Atomic Energy Commission may be called upon to consider anti-competitive practices in connection with nuclear plant licensing cases. *Louisiana Power & Light Co.*, Docket Nos. 50-382A and 50-383A. See 42 U.S.C. 2135. At the present time, no means of consolidating discovery and the taking of evidence among the several agencies has been devised.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
General Counsel,
Federal Power Commission.

MAY 1972.